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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1178

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Colorado Supreme Court (A. 19) is reported at 458 P.2d 760.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 15, 1969 (A. 45). On December 8, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including February 12, 1970. The petition was filed

on February 12, 1970, and was granted on March 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States in State courts for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides in pertinent part:

> Suits for adjudication of water rights.
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have

waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

This case arises from the attempted joinder of the United States, pursuant to the Act of July 10, 1952, 66 Stat. 560 (43 U.S.C. 666), as a defendant in a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "* * * all lands lying in the state of Colorado, irrigated by water taken from the Eagle river and its tributaries." Colo. Rev. Stat. 148-13-38 (1963). The Eagle River is a tributary of the Colorado River.

The United States moved to be dismissed as a party for lack of jurisdiction on the ground that its joinder in this proceeding is not within the consent to suit granted by 43 U.S.C. 666. Specifically, our objection is that the provisions of 43 U.S.C. 666 do not constitute consent to have adjudicated in a State court proceeding the reserved water rights of the United States, and that this particular proceeding, due to the inherent limitations of Colorado law, is not a general adjudication involving an entire river system. While denying State court jurisdiction over such

rights, the United States asserted reserved rights to sufficient water to accomplish the purpose of the withdrawal in 1905 of lands from the public domain for the White River National Forest (Presidential Proclamation of August 25, 1905, 34 Stat. 3144).[1]

The objections of the United States to the jurisdiction of the Colorado courts were overruled by the State district court and, on the government's application for a writ of prohibition, by the Colorado Supreme Court. The Colorado Supreme Court in an *en banc* opinion held that the United States has consented, through the enactment of 43 U.S.C. 666, to the adjudication by State courts of its reserved water rights, that the Colorado district courts have jurisdiction under Colorado law to make such adjudications, and that this supplemental adjudication proceeding is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666 (A. 29, 40-42).

In the course of its opinion the court strongly suggested that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights—*Arizona* v. *California*, 373 U.S. 546; *Winters* v. *United States*, 207 U.S. 564; *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission* v. *Oregon*, 349 U.S. 435—were not determinative. It indi-

[1] In addition to this general assertion of reserved water rights for the White River National Forest, the United States listed specifically the current and foreseeable uses of such water, and the estimated amounts involved (A. 6-9).

cated that a decision that the United States has reserved rights in Colorado streams would require the overruling of *Stockman* v. *Leddy*, 55 Colo. 24. There it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,[2] lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to Colorado law (A. 34-35).

SUMMARY OF ARGUMENT

I

43 U.S.C. 666 does not consent to adjudication of the reserved water rights of the United States by State courts. Its legislative history indicates that Congress intended to give the consent of the United States to be joined only in proceedings for the adjudication of water rights acquired pursuant to State law. Reserved rights are based solely on federal law, and are not dependent upon recognition by State law for their existence. Therefore, reserved water rights are not water rights acquired pursuant to State law.

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[2] Article XVI, Section 5, of the Colorado Constitution, provides:

> Section 5. Water of streams public property—The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Since State law, based on the appropriation system of water law, is inconsistent with the reserved rights doctrine, there is every indication that the reserved water rights of the United States would not be recognized in State adjudication proceedings. See *Green River Adjudication* v. *United States*, 17 Utah 2d 50. Taking into account considerations such as the conservation of natural resources, and other important reasons for federal withdrawals, Congress could not have intended to require the United States to submit its reserved rights in State adjudication proceedings and possibly defeat the purposes for which millions of acres of land have been withdrawn from the public domain. 43 U.S.C. 666 is a statute merely consenting to suit in certain circumstances, and is not one intended to dispose of valuable property rights of the United States. Any such disposition requires a clear expression of congressional intent, and that is plainly lacking in either the language or legislative history of 43 U.S.C. 666.

II

That the United States has reserved water rights based on withdrawals from the public domain is well established. *Arizona* v. *California*, 373 U.S. 546; *Winters* v. *United States*, 207 U.S. 564. The withdrawal, in 1905, of lands in Colorado for the White River National Forest reserved enough water from sources on those lands to fulfill the purposes for which they were withdrawn. The Colorado Supreme Court's suggestion that the Colorado Constitution, which has been held to assert ownership of all unappropriated waters within the State, precludes ownership by the United States of reserved rights in Colo-

rado based on withdrawals from the public domain subsequent to statehood, is erroneous. Congress did not intend, in passing the enabling act providing for Colorado statehood, to give up any of its rights with respect to the public domain.

III

The supplemental adjudication proceeding in Water District 37 is not within the ambit of the consent to suit given in 43 U.S.C. 666. The legislative history of 43 U.S.C. 666, and the cases construing it, indicate that the United States consented only to *general* adjudication proceedings, where all parties claiming water rights on a stream system or other source are before the court, and all rights are to be determined *inter sese*. *Dugan* v. *Rank*, 372 U.S. 609; *Miller* v. *Jennings*, 243 F.2d 157 (C.A. 5), certiorari denied, 355 U.S. 827.

The proceeding in Water District 37 is not a general adjudication for two reasons. First, it does not embrace an entire river system. It includes only one tributary of the Colorado River, and involves only one of 70 water districts in Colorado. To require the United States to participate in such fragmentary adjudications would impose an intolerable burden of litigation on the government in order to protect its proprietary interests. Second, all parties claiming water rights in Water District 37 are not before the State court. Since under Colorado law the only parties to a supplemental adjudication are those who have acquired water rights subsequent to the last adjudication, and the United States claims water rights

with earlier priorities than those decreed in previous adjudications to which it was not a party, all parties necessary to a general adjudication are not before the court.

ARGUMENT

Introduction. An understanding of the issues in this case requires a careful consideration of federal withdrawals of land from the public domain, with particular emphasis on the purposes of such withdrawals. An apparent conflict is readily discernible between the federal rights arising from these withdrawals—*reserved rights*, and rights acquired pursuant to the appropriation system of water law prevalent in the western States—*appropriative rights*.

The United States owns approximately 725,000,000 acres of land in the 17 contiguous western States and Alaska. U.S. Department of the Interior, *Public Land Statistics*, p. 10 (1968). Of this, about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, military reservations, national parks, national forests, national recreation areas, national monuments, wildlife refuges, etc.[3] Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States, rather than for the particular profit or use of the people who happen to live and work in the

[3] Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands Prepared for the Public Land Law Review Commission*, App. G, Table G.1 (1968).

immediate area. Certainly this is true of the national forests, such as the one involved in this case. For the water which is essential to the utilization and administration of these lands, the United States depends both on water rights based on federal law and on water rights acquired pursuant to State law.

The water rights of the United States based on federal law consist primarily of reserved rights. Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, with a priority as of the date of withdrawal, subject only to water rights vested as of that date. *Winters* v. *United States*, 207 U.S. 564, 577; *Arizona* v. *California*, 373 U.S. 546, 598, 601. Not only is this a settled principle of law, but indeed a necessary one. For it would be idle to set aside large areas of the public domain for the enjoyment of future generations without providing the assurance of sufficient water for their maintenance.

On the other hand, the appropriation system of water law, which is prevalent in the western States,[4] does not lend itself to such conservation for the future. One of the fundamental characteristics of the appropriation system is that the rights of users of

[4] Alaska and eight of the western States, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, follow the strict appropriation system, or "Colorado doctrine." The other nine States have systems which contain elements of both the appropriation and riparian systems. 5 Powell, *The Law of Real Property*, Sec. 734, pp. 445-446 (1968).

water from the same source are carefully described as to priorities, amounts, and uses in adjudication proceedings. This requires the permanent fixing of rights to the use of water at the time of the adjudication proceedings. Furthermore, the total right is fixed as of the date of appropriation, *i.e.*, diversion and application to beneficial use. Such a system makes no provision for the future needs of lands withdrawn from the public domain.

I. 43 U.S.C. 666 Does Not Consent to Adjudications of the Reserved Water Rights of the United States

The Colorado Supreme Court has held that the United States, through the enactment by Congress in 1952 of 43 U.S.C. 666, has consented to the adjudication of its reserved water rights in State courts (A. 41). That holding is, we submit, erroneous. As indicated previously (*supra*, p. 6), the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona* v. *California*, 373 U.S. 546, 595-601; *Winters* v. *United States*, 207 U.S. 564; *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States* v. *Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577):

> [T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States* v. *Winans*, 198 U.S. 371. * * *

This essential idea has been brought up to date and correlated with the realities of modern public land management in *Arizona* v. *California*, 373 U.S. 546, 598, 601, where this Court stated:

> We have no doubt about the power of the United States under these clauses [the Commerce Clause, Art. I, Sec. 8, and the Property Clause, Art. IV, Sec. 3, of the Constitution] to reserve water rights for its reservations and its property.
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> * * * *
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> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Taking into account the unquestioned existence of federal reserved water rights, both the language of 43 U.S.C. 666 and its legislative history clearly show that Congress consented only to suits for the adjudication of water rights of the United States acquired pursuant to State law. The statute provides:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The most reasonable construction of this language is that the phrase, "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise," limits the scope of the statute to rights derived from State law. The only words in that phrase which could include other types of rights, such as reserved rights, are "or otherwise." Application of the traditional rule of *ejusdem generis* leads to the conclusion that those words do not include rights not derived from State law. See Comment, *Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 Calif. L. Rev. 94, 109-112 (1960), where the matter is thoroughly discussed.

The legislative history of the statute supports the foregoing construction. Senate Report No. 755, 82d Cong., 1st Sess. (1951), on S. 18,[5] stated the purpose of the legislation (pp. 4-5):

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[5] S. 18 never became law. It was added to H.R. 7289 in the 82d Cong., 2d Sess. (1952), which was enacted on July 10, 1952, as P. L. No. 495, 66 Stat. 560—now 43 U.S.C. 666.

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights *acquired under State law* are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity. [Emphasis added.]

Continuing, the report further stated (pp. 5-6):

> The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior

> appropriation. When *these lands and water rights* were acquired rom the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.
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> * * * *
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> The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the Court in the same manner as if it were a private individual. [Emphasis added.]

On October 11, 1951, Senator McCarran, the sponsor of S. 18 and Chairman of the Senate Judiciary Committee which reported on the bill, said on the Senate floor (97 Cong. Rec. 12947, 12948 (1951)):

> [T]he purpose of the proposed legislation is to permit the United States of America to be joined as a defendant in any suit for the adjudication of rights to the use of water * * * *where it appears that the United States is the owner, or is in the process of acquiring ownership of rights by appropriation under state law*, and where there is a showing that the United States is a necessary party to such adjudication. [Emphasis added.]
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> * * * *
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> Particularly in view of the fact that the United States has acquired its water rights from former owners who were subject to such suits, the committee is of the opinion that to allow the United States in its own right or as a trustee to have a better right than the former owner is not fair and just to the other water users on the stream.
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> * * * *

> [T]he Government of the United States, during the past 15 or 18 years, has acquired on the various natural streams of the West holdings in real estate which was formerly taken up by private citizens, diverted water from the natural streams and applied it to the land. Then the Government acquired the land and the water rights. If some water user on the stream seeks to establish what his water rights are, he must of necessity bring the Government in as a party defendant or a party litigant in the suit.

Thus, an examination of the pertinent legislative history plainly shows that the thought foremost in the minds of the interested legislators was the problem created because the State courts were unable adequately to adjudicate the water rights of private individuals who made claims under the State appropriation system. This was because in many instances the United States also claimed appropriative rights under State law and hence was a necessary party to the general adjudication of such rights. Taking into account the nature of reserved rights, on the other hand, it seems obvious that consent to have them adjudicated would not alleviate the problems with which Congress was concerned. For that reason, the consent given in 43 U.S.C. 666 should not be construed to extend to the adjudication in State courts of the reserved water rights of the United States.

Certainly this interpretation, that the consent given by 43 U.S.C. 666 extends only to suits for the adjudication of the water rights of the United States acquired pursuant to State law, is consistent with the provision of the statute that

> * * * the United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty * * *.

But if, as the Colorado Supreme Court has concluded, the consent extends to suits for the adjudication of the reserved rights of the United States, it might be argued that by this language the United States agreed that it has reserved rights only to the extent that they are recognized by State law. While we believe such an argument is untenable, the fact is that State law, which in the western States involves the appropriation system of water law, makes no provision for reserved water rights. Therefore, if the State courts have jurisdiction to "adjudicate" the reserved rights of the United States, this portion of the statute could be an effective instrument for the abolition of such rights, contrary to established principles of law, and could thwart the national policy of preserving natural resources. That this is a real and not a theoretical problem can be seen by a closer scrutiny of the western States' water law.

The appropriation system of water law in effect in most of the western States is essentially different from the concept of reserved water rights. Under the strict appropriation system, or "Colorado doctrine," a water right is acquired only through diversion and application of water to a beneficial use.[6] *Coffin* v.

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[6] An actual physical diversion may be required only where necessary to apply the water to a beneficial use. See *Genoa* v. *Westfall*, 141 Colo. 533.

Left Hand Ditch Co., 6 Colo. 443. To "adjudicate" means, essentially, to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use. Colo. Rev. Stat. 148-9-11, 13 (1963). Such water rights are subject to loss through abandonment, a rebuttable presumption of which is raised by long non-use. *Mason* v. *Hills Land & Cattle Co.*, 119 Colo. 404. These legal characteristics are incompatible with reserved rights, which arise *automatically* when lands are withdrawn from the public domain, have priority dates as of the dates of such withdrawals, and apply to future as well as existing uses. *E.g.*, *Arizona* v. *California*, 373 U.S. 546, 595-601.

Central to the "Colorado doctrine" of water law is the idea that since, of "imperative necessity," the appropriation system has existed in Colorado "from the date of the earliest appropriations of water within the boundaries of the state," and ownership of land has never carried any water rights with it (*Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443; *Farm Investment Co.* v. *Carpenter*, 9 Wyo. 110), the United States, like any other landowner, has only those water rights which it has acquired pursuant to State law.

In short, if the consent of 43 U.S.C. 666 extends to adjudication of the reserved water rights of the United States, the way is open for the Colorado courts and the courts of the other western States to attempt to "adjudicate" those rights out of existence.[7] Con-

[7] That this is what the Colorado Supreme Court had in mind is demonstrated by the following excerpts from its opinion (A. 23-24, 27):

gress could not have intended that, however, for it would effectively convert 43 U.S.C. 666 from a statute simply consenting to suit in limited circumstances to an enactment effectively disposing of valuable property rights of the United States. To do this surely requires a clear and unambiguous expression of congressional intent; such an expression is plainly lacking, however, in the language and background of 43 U.S.C. 666. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404; *United States* v. *Fitzgerald*, 15 Pet. 407, 421; *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116.

Were the Colorado Supreme Court's decision permitted to stand, the reserved rights of the United States would be vulnerable to the vagaries of inconsistent State laws, with the result that the purposes for which millions of acres of land have been withdrawn from the public domain might be frustrated. The United States cannot, at this late date, perfect enough water rights under State law to satisfy the needs of these lands. Moreover, a decision of this

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[7] [Continued]

> The trend of Congressional legislation has been to require the United States to be in the position of any other claimant to water rights.
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> * * * *
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> Our situation with respect to water rights has been that priorities are decreed under state laws, but that any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

Court excluding reserved water rights of the United States from State adjudication proceedings would not produce the "undesirable, impractical and chaotic situation" that the Colorado Supreme Court envisioned (A. 27; see note 7, *supra*). Nothing in such a decision would preclude the United States from continuing the practice it has followed in the past—listing and seeking recognition, in adjudication proceedings to which it is otherwise properly a party, of its existing and estimated future requirements for water claimed under the reserved rights doctrine in the area involved.[8]

In short, it is our position that the plain language of the statute, fortified by its legislative history, shows that Congress, in enacting 43 U.S.C. 666, did not intend that the important reserved water rights of the United States be determined by State courts under State laws which are inconsistent with a recognition of the water rights necessary to the preservation of these valuable national assets for posterity.

II. The Reserved Rights Doctrine Is Applicable to Lands Withdrawn From the Public Domain in the State of Colorado

While the Colorado Supreme Court has not specifically denied the existence of federal reserved water

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[8] See letter of June 14, 1961, from Orville L. Freeman, Secretary of Agriculture, to Senator Clinton P. Anderson, Chairman, Senate Committee on Interior and Insular Affairs (Hearings before the Senate Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., on problems arising from relationships between the States and the Federal Government with respect to the development of Water Resources, V. 3, pp. 31-32).

rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights. For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions.

The Colorado Supreme Court's assertion (A. 23-24) that the Desert Land Act, 19 Stat. 377 (1877), as amended, 43 U.S.C. 321,[9] was intended "to require the United States to be in the position of any other claimant to water rights," is mistaken. When the area now comprising Colorado was ceded to the United States by France, Spain, Mexico and Texas,[10] the United States became the owner of all property rights within that area, except those which had passed into private ownership under the previous sovereign. *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15-16; *Knight*

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[9] That statute provides, in pertinent part: "[T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. * * *"

[10] Treaties of 1803 (Louisiana Purchase), 1819 (Florida Purchase), 1848 (Treaty of Guadalupe Hidalgo), and agreement with Texas in 1850.

v. *United States Land Association*, 142 U.S. 161, 183-184. The United States did not, by the Desert Land Act, transfer its ownership of unappropriated, non-navigable waters within the public domain to the States. That statute and its predecessors [11] merely provided that rights to the use of non-navigable waters within the public domain would pass from federal to private ownership in accordance with the appropriation system of water law established in the arid and semi-arid western States, rather than the riparian system established under the common law. As stated in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 447-448:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. *Jennison* v. *Kirk*, 98 U.S. 453. The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142. See also, *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616. [Emphasis in original.]

The result was that patents of public lands in States where the Desert Land Act was applicable did not carry water rights with them. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162-164. In so holding, this Court stated (*id.* at 162):

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[11] Act of July 26, 1866, 14 Stat. 253, and Act of July 9, 1870, 16 Stat. 218 (43 U.S.C. 661).

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * * The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. * * *

The Court had made it clear earlier, in *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, that the Desert Land Act and related statutes were intended only to recognize the appropriation system of water law in the western States, not to abdicate the rights and powers of the United States with respect to water on the public domain. There the Court had stated (*id.* at 703):

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering

> on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * *

Moreover, the Desert Land Act is inapplicable to lands which have been withdrawn from the public domain. *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 448.

The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman* v. *Leddy*, 55 Colo. 24, construed as an assertion of ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona* v. *California*, 373 U.S. 546, 597-598. By passing the enabling act providing for Colorado statehood,[12] Congress intended only to authorize statehood, not to give up any of its property rights with respect to the public domain. This is made clear by Section 4 of the enabling statute, which provides:

> [T]he people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States * * *.

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[12] Act of March 3, 1875, 18 Stat. 474.

Sections 7, 8 and 9 of the statute specifically granted the future State the right to select lands from the public domain for use for schools, public buildings, and a penitentiary. Had Congress intended to grant anything else, it would have done so by specific provision in the enabling legislation. The principle that public grants are to be construed against the grantee, and that nothing passes by implication, applies to grants by the United States to a State or a Territory. *Rice* v. *Railroad Co., 1 Black* 358, 380-381; *United States v. Michigan*, 190 U.S. 379, 401. Moreover, the enabling act was passed before Colorado adopted its constitution. After the constitution was adopted, Colorado was admitted into the Union by Presidential Proclamation (19 Stat. 665) without further action by Congress. Notwithstanding any provisions of the Colorado constitution, then, it is clear that when, on August 25, 1905, lands in Colorado were withdrawn from the public domain to establish what is now the White River National Forest,[13] enough of the appurtenant water was reserved to fulfill the purposes for which those lands were withdrawn, subject only to water rights vested on that date.

III. The Proceeding in Water District 37 is not the Type of Suit to which 43 U.S.C. 666 Consents

The conclusion to be drawn from the legislative history of 43 U.S.C. 666, as well as the cases construing it, is that the proceeding to which the United States is sought to be joined must be one where all

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[13] Presidential Proclamation of August 25, 1905, 34 Stat. 3144.

parties claiming rights to the use of the water of a river system or other source are before the court, and all claimed rights are to be determined *inter sese*.

Senate Report No. 755, 82d Cong., 1st Sess., p. 9 (1951), indicates the nature of the proceeding contemplated by quoting from *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 447-448, where this Court described a State water adjudication proceeding:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end * * * that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; * * *.

The Senate report also contains a letter from Senator McCarran, chairman of the committee reporting on the bill, to Senator Magnuson (p. 9):

> S. 18 * * * is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

In *Dugan* v. *Rank*, 372 U.S. 609, this Court held that a suit involving water rights on a portion of the San Joaquin River in California was not the kind of

"*general* adjudication" contemplated by 43 U.S.C. 666. There the Court stated (*id.* at 618-619):

> It is sufficient to say that the provision of the McCarran amendment, 66 Stat. 560, 43 U.S.C. § 666, relied upon by respondents and providing that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted. * * * [Emphasis in original.]

In like vein, in *Miller* v. *Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827, the court said:

> The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time." People of the State of California v. United States, 9 Cir., 1956, 235 F.2d 647, 663. See Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084."

The supplemental adjudication proceeding in Water District 37 does not meet the foregoing requirements of a general adjudication, and the court below accordingly erred in holding that the United States was properly joined. The United States does not contend that the cases construing 43 U.S.C. 666 are necessarily dispositive of the question whether Water District 37, which embraces the watershed of one tributary of the Colorado River, comprises a "river system" within the meaning of the statute. But it seems apparent from the legislative history that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread.

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[11] See also the opinion of the court of appeals, *sub nom. State* v. *Rank*, 293 F.2d 340, 346-348 (C.A. 9), which was affirmed in *Dugan* v. *Rank*, *supra*; *State of Nevada* v. *United States*, 279 F.2d 699, 701 (C.A. 9); *City of Chino* v. *Superior Court of Orange Co.*, 255 Cal.App.2d 747.

Where a river system can be said to be wholly contained within one State, the proceeding should at least relate to the entire system and include all parties asserting rights to the water thereof. And where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.

Turning to the instant case, we emphasize the fact that Water District 37 is only one of 70 water districts in Colorado, and that the United States has been joined in similar proceedings in Water Districts 36, 51 and 52 in Colorado,[15] as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is allowed to stand. Such a result, we believe, would significantly distort and effectively thwart the intent of Congress.

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[15] On June 7, 1969, the Water Right Determination and Administration Act became effective in Colorado. The Act amends Colo. Rev. Stat. 148-21-1 *et seq.* (1963) by consolidating the 70 water districts into seven water divisions, each designed to include an entire river drainage basin. Water District 37 will be within Division 5, which includes the Colorado River and its tributaries, except the Gunnison River. The Act governs adjudication proceedings initiated after its effective date, but appears to give parties to actions pending at that time the option of proceeding under the new statute. However, since the Colorado Supreme Court found the Act to be immaterial to its decision (A. 22), it is not discussed in detail here. In any event, the new legislation does not detract from the importance of the question presented here, because it does not affect the problem of piecemeal adjudications in other western States.

The legislative history of 43 U.S.C. 666 and the cases construing it make clear that one of the conditions of the congressional consent to suit is that, regardless of the size of the stream or other source involved in the adjudication proceeding, all parties who claim water rights must be before the court. *Dugan* v. *Rank*, 372 U.S. 609, 618; *Miller* v. *Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827. Under Colorado law, however, the only parties before the court in a supplemental adjudication proceeding are those who claim water rights acquired since the last adjudication in that water district. Colo. Rev. Stat. 148-9-7 (1963). The earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceding adjudication. Colo. Rev. Stat. 148-9-13 (1963); *Hardesty Reservoir, Canal & Land Co.* v. *Arkansas Valley Sugar Beet & Irrigated Land Co.*, 85 Colo. 555. The last water adjudication decree in Water District 37 was entered on February 21, 1966. The United States was not a party to that or any prior proceeding in Water District 37.

Thus, since the United States claims water rights in Water District 37, acquired under State law, with earlier priority dates than those previously decreed, in order for there to be a general adjudication determining all claimed rights *inter sese*, within the contemplation of 43 U.S.C. 666, the owners of the previously decreed rights must also be before the court. In other words, the United States cannot be bound by previous decrees in Water District 37 entered in its absence. *Arizona* v. *California*, 298 U.S.

558, 571-572.[16] The Colorado Supreme Court's statement (A. 43) that the district court can bring additional parties before it does not resolve the jurisdictional problems presented. The proceeding to which the United States is sought to be joined must meet the requirements of 43 U.S.C. 666 at the time of the attempted joinder, or else jurisdiction over it is lacking. It is therefore inescapable that this supplemental adjudication proceeding in Water District 37, even assuming that an entire river system is in fact involved, is not a general adjudication that comes within the ambit of the consent to suit given by 43 U.S.C. 666, and that the Colorado Supreme Court erred in concluding to the contrary.

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[16] Although the Colorado Supreme Court said it was "inclined" to agree, it refused so to hold (A. 38).

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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